83-567

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ARTHUR GARLAND HESS, PETITIONER

versus

STATE OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

J. MARVIN MULLIS, JR.
F. DAVID BUTLER
P. O. Box 7757
Columbia, SC 29202
803-799-9577
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of South Carolina erred in not reversing the lower court when it denied a motion to quash the indictment, or, in the alternative, to dismiss based on the principle of collateral estoppel.

2. Whether the Supreme Court of the State of South Carolina erred in not reversing the lower court and remanding for a new trial because of the lower court's denial of the Petitioner's due process rights under the Fourteenth Amendment of the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other:

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ARTHUR GARLAND HESS, PETITIONER

versus

STATE OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Arthur Garland Hess, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of South Carolina entered in the above-entitled case on July 7, 1983.

OPINION BELOW

The opinion of the Supreme Court of

South Carolina is reported at State vs. Arthur Garland Hess, _____ S.C. _____, _____S.E. 2d _____ (1983), Davis' Advance Sheets for the State of South Carolina, Opinion No. 21946, filed July 7, 1983; said opinion is printed in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of South Carolina was entered on July 7, 1983. A timely petition for rehearing was denied on August 4, 1983. Said Order is printed in the Appendix hereto. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1257 (3).

STATEMENT OF CASE

The Petitioner Arthur Garland Hess became the Chief of Police of Columbia,

South Carolina, on November 12, 1978, only after working extensively in the northern United States, mostly in Illinois and Washington, D.C. Hess' police experience, largely in administration, included a four-and-one-half-year stint as the police chief of the Downer's Grove, Illinois, police department. The Petitioner had earned a Master of Public Administration degree in December of 1970 from the Illinois Institute of Technology.

When Hess became the police chief of the Columbia, South Carolina, police department, his naming was done in direct opposition to the wishes of the sheriff of Richland County and the solicitor (prosecutor) of the Fifth Judicial Circuit of South Carolina, which includes, among others, Richland County. Once assuming his position, Chief Hess was

informed that one Joel Hendrix was a primary source of the overall criminal activity in the City of Columbia. Chief Hess had his officers look into the situation and found that Hendrix was connected with vice, gambling, stolen property and arson in the City of Columbia. Hess then set up several undercover operations with operational level officers. Each time his efforts were thwarted because of information leaks in the Columbia Police Department. Hess noted that Joel Hendrix had close associations in the past with high-ranking officials in the Columbia Police Department, including the former chief of police and several captains.

During this time Hess reformed the Columbia Police Department, establishing new divisions to make the department more

efficient and generally making his department one of the best in the State.

During Chief Hess' tenure he knew that there was an information leak in the department which was leaking word to Hendrix of the department's undercover operations against him. However, Chief Hess could not pinpoint this leak. He expressed his concern about this to his deputy chief in the Downer's Grove Police Department, Louis Fulgaro. In December, 1978, or January, 1979, Joel Hendrix came to the Petitioner's office to offer him a bribe. Chief Hess refused this bribe. As of October, 1980, the Petitioner had not had much success in his various undercover operations against Joel Hendrix. He then attempted to establish a one-man sting operation in which he would attempt on different occasions to get Joel Hendrix

to offer him a bribe by offering "stale" information on ongoing investigations into matters in which Hendrix had an interest. On the last occasion, the meeting between the two would take place in the City of Columbia, at which time Chief Hess was going to arrest Joel Hendrix for bribery. During these meetings it was Chief Hess' testimony that he was portraying the role of a crooked cop only to attempt to get Joel Hendrix to offer him bribes. Chief Hess met with Hendrix on three different occasions. On the second occasion Hendrix gave him $1,000 at a rest stop in Calhoun County, South Carolina. The third and final meeting between the two took place on January 3, 1981, at a Family Mart Store in West Columbia, South Carolina. The second meeting had been audio-taped and

video-taped by the South Carolina Law Enforcement Division, South Carolina's equivalent to the national Federal Bureau of Investigation. After the third meeting, at which time no money was passed between the two, South Carolina Law Enforcement Division (otherwise known as "SLED") agents arrested the Petitioner. As it turned out, Joel Hendrix had asked for the cooperation of the State Law Enforcement Division in "attempting to catch Chief Hess accepting a bribe." On April 20, 1981, Arthur Garland Hess was indicted on two counts of obstruction of justice, two counts of misconduct in office, one count of extortion, and one count of accepting a bribe by an officer. The charges were tried at the June 22, 1981, term of the Court of General Sessions for Lexington County, South Carolina.

Chief Hess was convicted on two counts charging misconduct in office. Significantly, he was found innocent on a charge of obstruction of justice. On March 15, 1983, the South Carolina Supreme Court affirmed both convictions on the misconduct in office charges. On April 7, 1983, the Supreme Court of South Carolina denied the Petitioner's timely Petition for Rehearing, and a Petition for Writ of Certiorari was timely filed in this Court on June 6, 1983. Said petition is presently pending.

Chief Hess was indicted on May 21, 1981, in Calhoun County, South Carolina, on one count of obstruction of justice, one count of misconduct in office, one count of extortion, and one count of acceptance of a bribe by an officer. The charges were tried at the November 16,

1981, term of the General Sessions Court for Calhoun County before The Honorable James M. Morris, presiding judge, and a jury. The Petitioner was acquitted of extortion and acceptance of a bribe, but was convicted of misconduct in office and obstruction of justice. Following denial of Petitioner's motion for judgment notwithstanding, or in the alternative for a new trial, Chief Hess was sentenced to concurrent terms of imprisonment for a period of three years on the obstruction of justice conviction and one year on the misconduct in office conviction. A Notice of Appeal to the South Carolina Supreme Court was timely served on November 24, 1981. On July 7, 1983, the South Carolina Supreme Court affirmed the obstruction of justice conviction and vacated the misconduct in office convic-

tion. The Opinion of the Court appears in the Appendix to this Petition. On August 4, 1983, the Supreme Court of South Carolina denied the Petitioner's timely Petition for Rehearing.

REASONS FOR GRANTING WRIT

1.

The Decision Below Conflicts with the Decisions of the Supreme Court of the United States Based on the Principles of Collateral Estoppel and Double Jeopardy.

Collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Harris v. Washington, 92 S. Ct. 183, 404 U.S. 55, 30 L.Ed.2d 212 (1971). The principle originally announced by this Court in Ashe v. Swenson, 397 U.S. 436, bars a second criminal trial where the defendant has been acquitted in a previous trial involving the same ultimate factual issue, and this applies irrespective of whether the jury in the first trial

considered all relevant evidence, and it applies irrespective of the State's good faith in bringing successive prosecutions. Harris v. Washington, Id.

The Petitioner Arthur Hess was arrested on January 3, 1981, and charged with the offenses of bribery and extortion in both Lexington and Calhoun Counties, South Carolina. It was the allegation of the State that Chief Hess had accepted bribes in both counties for the purpose of assisting one Joel Hendrix in criminal activity. On April 23, 1981, the grand jury of Lexington County, South Carolina, returned a true bill on an indictment charging Chief Hess with one count of common law extortion, one count of acceptance of a bribe by an executive officer, two counts of obstruction of justice, and two counts of misconduct in office. On

May 21, 1981, the grand jury of Calhoun County, South Carolina, returned a true bill charging Chief Hess with one count of acceptance of a bribe by an executive officer, one count of common law extortion, one count of obstruction of justice, and one count of misconduct in office.

Chief Hess was brought to trial in Lexington, South Carolina, on June 22, 1981, on the indictments and was found not guilty of all indictments except those charging official misconduct. During the trial in Lexington, the State introduced over the objection of the defendant the evidence of Chief Hess' actions in Calhoun County on October 18, 1980, on which the Calhoun County charges are based. The meeting between Chief Hess and Joel Hendrix was videotaped on October 18, 1980, and the trial court

allowed introduction of the tape and testimony concerning what occurred on that occasion from both Joel Hendrix and the officers that observed the meeting. There is no allegation of any additional evidence from the October 18, 1980, meeting.

The indictments in both counties allege as to the bribery and extortion counts that Chief Hess was acting "pursuant to a common scheme, design, and plan." In addition, the Lexington indictment on obstruction of justice alleged that Chief Hess acted "willfully, corruptly, and unlawfully [to] prevent, impede, obstruct, hinder or interfere with the orderly administration of justice, or attempt to do so." The obstruction indictment also alleges that the actions of Chief Hess were pursuant to a

"common scheme, design, plan, and agreement."

The indictment for misconduct in Lexington alleged that Chief Hess had passed information concerning pending investigations only and did not allege the common scheme or plan, nor that his actions were wilful or unlawfully done, but simply that the passing of the information was corruptly done. The indictments did not allege that the information was passed in return for any favor or gratuity.

The misconduct indictment in Calhoun County alleges that Chief Hess "wilfully, knowingly, and corruptly" discharged his duties and that he received $1000.00 in return for the information.

The defendant made a motion of the lower court for an order quashing the

indictments returned in Calhoun County on the ground that to allow further prosecution on the matters concerning bribery, extortion and obstruction of justice would be a violation of the principles of collateral estoppel which have been recognized as "an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments." Harris v. Washington, supra.

Collateral estoppel has been defined by the United States Supreme Court and it "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the parties in any further lawsuit." Ashe v. Swenson, supra. Once such a question has been decided, "the constitutional guarantee applies, irrespective of whether the

jury considered all relevant evidence, and irrespective of the good faith of the State in bringing successive prosecutions." Harris, supra, at 56-57.

A court, in deciding whether the State is collaterally estopped from further prosecution in a matter, should look to several areas to determine if the principle is applicable. In Ashe the Court made it clear as to how the trial court should determine these issues:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter,

> and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." Sealfon v. United States, 332 U.S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal. Ashe at 444.

Basically, once an issue of fact has been determined by a jury adversely to the State, that same issue may not be relitigated in a subsequent trial between the same parties. Unless the jury verdict in Lexington County could have been based upon an issue other than that which the defendant seeks to foreclose from consid-

eration, the State may not retry the defendant on charges involving the same allegations. Simpson v. Florida, 403 U.S. 384, 386-387 (1971).

The issue at trial on the bribery, extortion and obstruction of justice charges against Chief Hess was whether Chief Hess had the intent to commit these crimes. The only factually disputed issue was whether Joel Hendrix actually passed $3,000.00 to Chief Hess on January 3, 1981. It was undisputed that Joel Hendrix was supposed to make such an exchange. The evidence introduced by the State concerning the exchange of $1000.00 in Calhoun County made it clear to the jury that money had been passed between the parties, and this fact was admitted and testified to by the defendant. In addition, the obstruction of justice

charge did not rely on the passage of the $3000.00, but alleged that Chief Hess obstructed or attempted to obstruct justice under an agreement with Joel Hendrix that he would receive "monies." It was undisputed that such an agreement existed and that there had been the passage of "monies." The only defense put forth by Chief Hess was that he did not have the intent to commit these crimes and the agreement entered into by Hendrix and Chief Hess was done so with the intent to prosecute Joel Hendrix.

As already noted, the State was proceeding on the theory that both transactions (Lexington and Calhoun) were part of a common scheme or plan. It was under this theory that the State indicted Chief Hess in both counties, and it was under this theory that all of the evidence of

the Calhoun County case was admitted in the trial in Lexington.

Under our South Carolina state case law, uncharged crimes are not admissible in a criminal trial unless such crimes or acts are offered to prove intent, motive, common scheme or plan, absence of mistake or accident or the identity of the person charged. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The basic rule laid down by Lyle is:

> If it (other crime) is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. Lyle at 807.

Obviously, here the State set forth in its indictment the theory under which the Calhoun County evidence was admitted,

that being a common scheme or plan. In addition, these acts would have been admissible as to intent, motive, and to remove any question of whether the meeting at Family Mart was an accident.

The State chose to use the Calhoun evidence to attempt to prove a material fact as to whether Chief Hess had entered into a common scheme or plan to accept monies in return for protection for Joel Hendrix. Whether Chief Hess actually received the money from Lexington County was not the material issue involved in the obstruction of justice indictments, and therefore the acquittal on these charges could not have been based on any question as to whether the money in Lexington passed hands. There was uncontradicted testimony that Chief Hess had in fact received monies in Calhoun County

for just such an agreement. Yet, the jury found that such a common scheme or plan did not exist. The only indictments which did not allege a common scheme or plan and did not allege that any agreement was entered into for money were the misconduct indictments.

As such, the material fact upon which both prosecutions are based has been determined adversely to the State. The defendant based his defense upon the lack of intent to have a common scheme or plan with Joel Hendrix; in effect, that he did not have the intent to commit the crimes charged, but was acting with the intent to procure evidence against the giver of the gift. Such a defense has been recognized by our Supreme Court in State v. Meehan, 160 S.C. 111, 158 S.E. 151 (1930):

> If a person making a gift or offer or promise of money or other valuable consideration to an officer charged with the performance of public duties with an honest bona fide intent to test the official integrity and faithfulness of such officer in the doing of certain acts, and if such officer receives the gift or offer or promise, or other valuable consideration with a bona fide intent to procure evidence against the giver of such gift or offer or promise or other valuable consideration to procure evidence of bribery, neither the giver nor the receiver would be guilty of the crime of bribery under the law. Meehan at 155.

Clearly, the jury in Lexington found that there was not sufficient evidence to prove the intent or the common scheme or plan allged in the indictments. This is the issue which the Petitioner sees to "foreclose from consideration."

While the Petitioner feels that

regardless of whether the Calhoun County evidence had been admitted in Lexington County, collateral estoppel would still apply, this was not the case. The State chose to introduce all of the evidence from Calhoun County, South Carolina, to attempt to establish the common scheme or plan and the intent of Chief Hess. A jury has not only considered all the evidence from Lexington, South Carolina, but also the evidence the State intended to use in the subsequent prosecution with the same allegations.

The issue of whether Chief Hess entered into an agreement with Joel Hendrix to exchange protection for money has been resolved in Chief Hess' favor. To allow the State to relitigate this issue clearly violates the principles set forth in Ashe v. Swenson, supra, and its

line of cases on the same issue. The defense has been presented and accepted by a jury. This case involves the same allegations and the same parties and evidence that has already been considered by the jury that acquitted Chief Hess on these allegations.

As the South Carolina Supreme Court stated in its Opinion filed July 7, 1983, the records of the Calhoun County, South Carolina, case and the Lexington County, South Carolina, case are strikingly similar. Virtually the same facts were presented to both juries. The Fifth Amendment guarantee against double jeopardy, enforcible against the States through the Fourteenth Amendent of the United States Constitution, protects against a second prosecution for the same offense after acquittal. North Carolina

v. Pierce, 89 S. Ct. 2072, 395 U.S. 711, 23 L. Ed. 2d 656 (1969); Simpson v. Rice, 89 S. Ct. 2072, 395 U.S. 711, 23 L. Ed. 2d 656 (1969). It is clear that the Petitioner's Fifth Amendment guarantee has been violated.

2.

The Decision Below Conflicts with the Decisions of the Supreme Court of the United States as to Due Process of Law.

The Supreme Court of South Carolina refused in its Opinion to consider the Petitioner's due process arguments. In determining whether an accused was denied due process in reprosecution in State court, the question is not whether he had actually been prejudiced or whether there was a reasonable possibility that he had been prejudiced. Hetenyi v. Wilkins, 348 F.2d 844; cert. denied, Mancusi v. Hetenyi, 86 S. Ct. 896, 383 U.S. 913, 15 L. Ed. 2d 667 (N.Y. 1965). The due process clause of the Fourteenth Amendment will prohibit double jeopardy at the hands of the State where successive prosecutions are fundamentally unfair. Robinson v. Henderson,

268 F. Supp. 349, aff. 391 F.2d 933 (Tenn. 1967). Apart from the double jeopardy clause of the Fifth Amendment, the due process clause of the Fourteenth Amendment standing alone imposes some limitations on a State's power to prosecute an individual who has previously been prosecuted for the same offense. Barnett v. Gladden, 375 F.2d 235 (Ore. 1967). It is clear in the case at bar that the reprosecution of the Petitioner Arthur Hess on obstruction of justice charges was grossly prejudicial to him. As has been previously argued, virtually identical cases were presented in both the Lexington County prosecution and the Calhoun County prosecution. No common scheme or plan was found in the Lexington County prosecution. Fairness therefore dictates that the Petitioner not be

retried on identical facts in a subsequent prosecution. This is fundamentally unfair and violates the due process clause. Further, the South Carolina Supreme Court failed to reverse the lower court when it refused to allow defense counsel to put forth his theory of the case. It is established law that defense counsel has a full right to present his theory of the case which the evidence tends to establish. 23A C.J.S., Criminal Law, § 1190, p. 481. The fundamental requirement of due process is the opportunity to be heard. Armstrong v. Manzo, 85 S. Ct. 1187, 380 U.S. 545, 14 L. Ed. 2d 62 (1965); Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982). Due process requires that there be an opportunity to present every available defense. Lindsey v. Normet, 92 S. Ct. 862, 405 U.S. 56, 31 L.

Ed. 2d 36 (1972). When one examines this case as a whole, it is clear that the Petitioner very clearly was limited in his right to present his defense by the conduct of the trial court. Such a limitation is in violation of the due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The Fifth Amendment of the United States Constitution guarantees against double jeopardy and protects against a second prosecution for the same offense after an acquittal. This Fifth Amendment guarantee is applicable to the States through the Fourteenth Amendment. Apart from double jeopardy, the due process clause of the Fourteenth Amendment guarantees against a prosecution that is fundamentally unfair. In the case at bar virtually identical facts were presented to two separate juries in two separate trials. The Petitioner was acquitted of obstruction of justice in the first trial. Virtual identical facts were presented in the second trial, and the Petitioner was convicted of obstruction of justice. Not only was the double jeopardy guarantee

not provided to this Petitioner, but the second prosecution was fundamentally unfair, and therefore in violation of the due process clause. Further, the lower court of South Carolina violated the Petitioner's due process rights by severely limiting his opportunity to present his case. All of these are severe violations of the Petitioner's constitutional rights.

Wherefore, the Petitioner respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the Supreme Court of South Carolina.

Respectfully submitted,

J. MARVIN MULLIS, JR.
F. DAVID BUTLER
P. O. Box 7757
Columbia, SC 29202
803-799-9577
Counsel for Petitioner

A P P E N D I X

OPINION NO. 21946

Filed July 7, 1983

AFFIRMED IN PART;
REVESED IN PART.

J. Marvin Mullis, Jr., of Law Offices of J. Marvin Mullis, Jr., of Columbia, for appellant.

Attorney General T. Travis Medlock, Retired Attorney General Daniel R. McLeod and Senior Assistant Attorney General Brian P. Gibbes, all of Columbia; and Solicitor Norman E. Fogle, of Orangeburg, for respondent.

LEWIS, C.J.: Appellant, the former Chief of the Columbia Police Department, was found guilty on two indictments, one charging obstruction of justice and the other alleging misconduct in office. Bribery and extortion charges led to verdicts of not guilty. We affirm the first conviction and vacate the second.

The facts of this case have been previously summarized in State v. Hess, Smith's Advance Sheets, Opinion #21880 (March 13, 1983), ____S.C. _____, 301 S.E.2d 547. That case was tried in Lexington County, and appellant was convicted on two indictments for misconduct in office, the indictments specifically charging that on two occasions appellant had corruptly provided police information to one Joel Hendrix, reputed to be a key figure in local criminal activities. Appellant had also been charged with accepting a bribe, extortion and obstruction of justice, but the Lexington County jury found him not guilty on those indictments.

In State v. Hess, supra, this Court closely reviewed the testimony and held that, "the key issue of fact for deter-

mination by the jury was the true intent or motive behind appellant's actions." We concluded that the record supported a finding of corrupt intent, and we further stated that, "Having found bad faith and corrupt intent, the jury could then proceed to determine whether or not the requisite elements of bribery, extortion, obstruction of justice and official misconduct had been proven under each of the separate indictments."

On this appeal it is argued that indictment and trial for offenses alleged in Calhoun County should be barred by the Lexington County verdict. The records of the two cases are strikingly similar; indeed they are identical in several places. The Calhoun County charges are both based upon meetings between appellant and Joel Hendrix on October 11th and 18th

in the course of which appellant provided information in return for a payment of One Thousand ($1,000.00) dollars. The State offered testimony to show that part of the information actually compromised an undercover investigation, thus constituting obstruction of justice, and that the remaining revelations amounted to misconduct in office. Appellant disputed the charge of a compromise, offering evidence that the undercover investigation had already been unmasked by independent events. Appellant also contended, as he had in Lexington County, that his sole purpose had been to lure Hendrix into acts of bribery as a legitimate means to combat his various operations.

Appellant urges that the doctrine of collateral estoppel should apply to this case as it did in Ashe v. Swenson, 397

U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 649. We disagree, since we read the Lexington County record differently from the appellant. Where he contends that the jury rejected allegations of corrupt intent, we have expressly stated that this ultimate fact was found adversely to appellant. For whatever reason, the jury thereafter found evidence of misconduct, under the trial court's instructions, but insufficient proof of bribery, extortion and obstruction of justice as alleged.

We agree, however, with appellant's contention that the Calhoun County prosecution for misconduct in office resulted in double jeopardy for a single offense. In State v. Hess, supra, this Court discussed the common law offense of misconduct in office. Applied to the facts of that case, we found that the appellant

had breached a duty of accountability, as that duty has developed in such jurisdictions as New Jersey. We were not called upon to explore all aspects of misconduct in office, for it was sufficient on that occasion to ascertain that the jury verdict comported with the evidence and the instructions of the trial court.

We now take note of another feature to misconduct in office, which is its versatile nature. The offense may consist of one act or a series of acts. Hitzelberger v. State, 197 A. 605, 609 (Maryland). In State v. Sharpe, 132 S.C. 236, 240, 128 S.E. 722, this Court upheld a misconduct indictment against the complaint that more than one instance of falsifying vouchers was listed under a single count. There being only one

crime, provable by a series of acts, our Court found the indictment to be sound against the claim of duplicity or multifariousness. In State v. Bolitho, 136 A. 164, 172, affirmed 146 A. 927, the courts of New Jersey spoke of malfeasance or misconduct in office as an offense that can be "continuous" in nature capable of indictment in a single count, "even though such acts were committed on different days, and differ in their nature and constitute distinct offenses against the law, so long as they are cognate to the charge of official misconduct." The Bolitho court upheld the prosecutorial decision to cast potentially distinct offenses as instead a series of acts constituting a single crime. See also State v. Weleck, 91 A. 2d 751, 761.

The record of appellant's Lexington

County trial, notwithstanding the separate indictments, is some indication that the State considered him guilty of a continuing offense. Indeed, the specific act of misconduct for which he has now been convicted in Calhoun County was proven by the same testimony as an integral part of the State's case in Lexington County, all over objection of the defendant. In State v. Hess, supra, we held that the State was entitled to make its case in this way. Having made this choice, however, the State must now live with the consequence.

As a general rule, only one prosecution is permissible for a continuing offense. 21 Am. Jur. 2d, Criminal Law Section 267. It has been said that, "A prosecution upon a charge laid at at date prior to a former indictment is barred by

an acquittal or conviction upon such former indictment, when the offense charged is a continuing one." Wharton's Criminal Law (14th Ed.) Section 59, p. 311, note 40. We find in this case, given the circumstances of the offense and given the sequence of indictments and the course of previous prosecution, that the appellant has once been found guilty of a continuing offense (misconduct in office). Retrial upon this charge, especially alleging acts prior to the former indictment, violates the rule of former jeopardy. State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (and cases cited). Accordingly, we vacate the present conviction of the appellant upon the charge of misconduct in office.

The charge of obstructing justice presents a distinct complex of issues

from that of misconduct in office. It is true that the State presented virtually the same testimony in both the Lexington and Calhoun County proceedings with regard to an undercover investigation of the J-and-J Gorcery store in Columbia during September and October of 1980. The testimony strongly suggests that appellant's revelations to Hendrix resulted in compromise of the investigation and even some endangerment of the police officer involved.

It is clear that this evidence had no relevance to the issue of appellant's intentions since it simply indicated the alleged result of his actions. Likewise, the evidence had no bearing on any of the indictments tried in Lexington County. Had the defendant objected to the police officer's testimony in the Lexington

trial, it would have properly been excluded. No objection was made. Thus, when the appellant was charged in Calhoun County with obstruction of justice on this specific set of facts, there was no prior indictment or adjudication upon which he could rely for purposes of former jeopardy. We find, therefore, that no bar existed to prosecution of the appellant in Calhoun County for obstruction of justice occurring thereon.

Appellant has presented twenty-three additional exceptions. Claiming adverse pre-trial publicity, he excepts to two rulings of th trial court which declined to dismiss all charges. No motion for change of venue was made nor any effort to establish through voir dire an actual prejudice arising from the cited publications. Given these circumstances, the

trial court acted properly.

Three exceptions were taken to statements of the trial judge and of the prosecutor made during the proceedings. In each instance we find the trial court exercised sound discretion and sufficiently protected defendant against prejudice. Particularly was this so when the trial judge reminded the jury during the State's closing argument that such arguments by counsel were not to be taken as evidence. By way of eight further exceptions, appellant complains of rulings which limited his presentation of evidence concerning his own prior record of honesty as well as the nefarious activities of Joel Hendrix. Virtually identical exceptions were taken in State v. Hess, supra, and we hold in this case also that the trial judge soundly applied rules of

relevancy and limitations upon cumulative evidence.

Appellant complains that transcripts of tape recordings used during trial placed undue emphasis upon evidence of his meeting with Joel Hendrix. We hold in this case, as we did on the prior appeal, that no prejudice arose from use of these tapes given appellant's concession that the events were accurately portrayed. Appellant sought to quash the indictments based upon unsubstantiated allegations that charges of racial prejudice were falsely placed before the Grand Jury. The trial court exercised sound discretion in refusing to disclose these proceedings upon such claims. Appellant urges that the trial court refused several requested jury charges, all to his prejudice. We find that the trial court

amply, if not generously, dealt with questions of reasonable doubt, credibility and circumstantial evidence. Appellant was acquitted of bribery charges, hence denial of his proposed charge on that point worked no prejudice. The remaining requests are supported by no authority and were properly refused.

We find that appellant's remaining exceptions either have no basis in the record or reveal no error of law and that a written opinion upon these issues would be of no precedential value.

Accordingly, we affirm conviction of appellant upon Count III of indictment (obstruction of justice) and vacate his conviction upon Count IV (misconduct in office).

LITTLEJOHN, NESS, GREGORY and HARWELL, JJ., concur.

THE SUPREME COURT OF SOUTH CAROLINA

August 4, 1983

F. David Butler, Esquire
1825 Sumter Street
Columbia, South Carolina 29201

Re: The State v. Arthur G. Hess

Dear Mr. Butler:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

s/ J. Woodrow Lewis C.J.
s/ Bruce Littlejohn A.J.
s/ J. B. Ness A.J.
s/ George T. Gregory, Jr. A.J.
s/ David W. Harwell A.J.

August 4, 1983."